

1 THE HONORABLE RICARDO S. MARTINEZ
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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 UTHERVERSE GAMING LLC,

14 Plaintiff,

15 v.

16 EPIC GAMES, INC.,

17 Defendant.

18 Case No. 2:21-cv-00799-RSM

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**DEFENDANT EPIC GAMES, INC.'S
MEMORANDUM OF LAW
REGARDING CLAIM
REQUIREMENT FOR AVATARS**

1 The Court should reject Utherverse's proposal for Final Instruction No. 11 regarding the
 2 "interpretation of claims." Utherverse's instruction adds additional language to the Court's claim
 3 construction order that was not part of the Court's final construction. Dkt. 456 at 3. Utherverse
 4 seeks to confuse the construction of the term "initial scene state"—which the parties agree may,
 5 but does not need to, have avatars—with the additional express requirement in the claim that "one
 6 or more avatars" must be included in the recorded experience file that is played back. Utherverse's
 7 position misstates the Court's claim construction order and conflicts with the plain language of the
 8 claim.

9 During claim construction, the Court stated that the definition of the term "initial scene
 10 state," *on its own*, did not require "one or more avatars." Dkt. 133 at 13. Epic does not dispute
 11 this. Other claims in the '605 patent use the term "initial scene state" without any additional
 12 limitation, and those claims do not require avatars. *See, e.g.*, TX001 at p. 16 (12:18-38), claim 19
 13 ("the processor plays back the recorded experience file in the new instance by rendering . . . objects
 14 of the initial scene state in the new instance and rendering updates to the initial scene state . . .").
 15 Claim 1, however, add the requirement that the playback of the recorded experience file must
 16 "includ[e] one or more avatars." *Id.* at p. 15 (10:48-53). The parties did not ask for that additional
 17 limitation to be construed.

18 During claim construction, Utherverse contended that the definition of "initial scene state"
 19 did not need to expressly recite the presence of avatars because those avatars were already required
 20 by the separate claim limitation "including one or more avatars." Dkt. 133 at 13. Utherverse
 21 explained that, as a result, it was not necessary for the Court to introduce an additional "redundant
 22 and repetitive" requirement that the "initial scene state" include avatars. *See* Dkt. 301-7 at 86:15-
 23 19 ("because the recitation of the avatar actually appears in the claim, [] having it be part of [both]
 24 the construction [of initial scene state] and [] the claim would actually make it redundant and
 25 repetitive"). Utherverse never suggested that the "one or more avatars" were entirely different
 26 avatars that were not present in the recorded experience file.

Now, faced with the undisputed absence of avatars in what they allege to be the recorded experience file that gets played back, Utherverse's expert made an entirely new argument. In particular, Utherverse's expert argued that the avatars in the "playing back" limitation can be different, new "player avatars" that are attending the events in real time. In other words, Utherverse argues that the "avatars" referenced in the "playing back limitation" do not have to be rendered from playback, but they can instead watch that playback. Not only is this inconsistent with the claim language, which requires "**playing back the recorded experience file by** rendering . . . objects . . . including one or more avatars," it also completely contradicts Dr. Rosenberg's prior testimony in this case. Dr. Rosenberg interpreted the avatars in the playing back limitation as "optional" and did not suggest that the "one or more avatars" were different player avatars not present in the recording that was being played back. *See* Rosenberg Depo Tr. (5/30/23) at 26:22-27:08 ("Claim 1 is talking about avatars that are optional, that may or may not be present in the recorded experience file and that would be in the playing back limitation"); *id.* at 29:19-30:06 ("the avatars in claim 2 are the same as the avatars in the last limitation of claim 1 which are different from the avatars in the playing back limitation which has to do with potential avatars, the optional avatars in the initial scene state"); *id.* at 182:1-183:3 ("There's avatars that are . . . the optional avatars as being in the recorded experience file, in the playing back limitation, and there is the avatars that are player controlled which are the ones that are in the automatically transporting.").

The plain language of the claims, the prosecution history of the patent, and the governing law all make clear that claim 1 requires "one or more avatars" in the playback of the recorded experience file. Utherverse should not be permitted to confuse the jury into thinking otherwise. The Court should therefore adopt Epic's proposal for Disputed Jury Instruction No. 11.

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2 Dated: May 15, 2025

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CERTIFICATE OF SERVICE

2 I hereby certify that on May 15, 2025, the within document was filed with the Clerk of
3 the Court using CM/ECF which will send notification of such filing to the attorneys of record in
4 this case.

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